

The Applicability of the Sherman Act to Legal Practice and Other “Non-commercial” Activities

Two recently filed antitrust class actions raise, for the first time, the question of the Sherman Act's applicability to the legal profession. An action filed against local and state bar associations in Virginia alleges that the associations have restrained competition in the market for legal services by fixing the minimum fees that may be charged by practicing attorneys.¹ Another action, filed against the publisher of the *Martindale-Hubbell Law Directory*,² alleges that the *Directory* permits established attorneys to suppress potential competitors by basing its ratings on their solicited evaluations of their competitors' competence.³

The threshold question in these suits will be jurisdictional—whether the Sherman Act applies to the practice of law. In the past, some courts have exempted activities from the Sherman Act because they were (1) not “trade or commerce” or (2) “traditionally non-commercial.” If the courts find that the practice of law comes within either limitation, the question of jurisdiction will turn on the validity of the limitations themselves. And because these limitations may be interpreted broadly to include the learned professions, higher education, amateur athletics, and a wide range of other activities, disposition of the threshold jurisdictional issue in the *Martindale-Hubbell* and *Virginia State Bar* suits may well determine the Sherman Act's applicability to many important sectors of the economy.

Courts have justified these limitations by reference to legislative

1. *Goldfarb v. Virginia State Bar*, Civil Action No. 75-72-A (E.D. Va., filed Feb. 20, 1972).

2. *Steingold v. Martindale-Hubbell, Inc.*, Civil Action No. 72-1460 (N.D. Cal., filed Aug. 11, 1972). The *Directory* is a “law list” which the complaint describes as follows: Law lists are compilations of the names and biographical data concerning lawyers and related services needed by lawyers. Usually the lists are organized grouping lawyers [*sic*] by the geographical area in which they practice. The utility of these lists is to enable anyone seeking to engage the services of a lawyer to have a ready source of information regarding the names and addresses of available lawyers and an indication of their competence.

Complaint at 3.

3. *Id.* at 5. The complaint avers that the *Directory* is a self-perpetuating trust, an athletic supporter for banks, insurance companies, mortgage companies, railroads, and lawyers friendly to them. . . . The *Directory* is a plan, trust, scheme, and design to stifle competition and lower the standards of the Bar by recommending and keeping “forwarded” cases within the hands of a small, silk-stockings-knicker-bocker-split-fee-club of inept commercial lawyers.

Id.

intent.⁴ They have never provided any evidence of intent, however, and a reexamination of the legislative history and language of the Act shows that no such evidence exists. On the contrary, Congress clearly intended to strike broadly at certain economic evils and to reach those evils wherever they might appear. Limitations that exempt activities categorized as "traditionally non-commercial" or not "trade or commerce" seriously undermine this policy. Additional institutional considerations, such as the need for predictable, principled adjudication, also militate against preserving the limitations. Wherever the potential for those economic evils is shown, therefore, the courts should take jurisdiction, regardless of the activity concerned. And, in the practices at issue in these two suits, the potential can clearly be shown.

I. Support for the Limitations

Although the two limitations overlap somewhat, they are not co-extensive and they have separate origins. In content, they reach similar⁵ groups of activities; however, these groups are not necessarily iden-

4. See, e.g., *Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools*, 432 F.2d 650, 653-54 (D.C. Cir. 1969), cert. denied, 400 U.S. 965 (1971); *United States v. American Medical Ass'n*, 28 F. Supp. 752, 755 (D.D.C. 1943).

5. Among the activities apparently excluded by the "trade or commerce" limitation are the "learned professions" such as law and medicine.

The Supreme Court has never specifically held that the learned professions fall within this limitation, but this conclusion has long been inferred from the language of several cases. In *FTC v. Raladam*, 283 U.S. 643 (1931), the Supreme Court said:

Of course, medical practitioners, by some of whom the danger of using the remedy without competent advice was exposed, are not in competition with respondent.

They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them.

283 U.S. at 653.

In *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), the Supreme Court found the Sherman Act applicable to the activities of real estate brokers after distinguishing their activity from what it called "professions." In *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), the court stated: "The practice of his profession [medicine] as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act . . ." *Id.* at 268. See also *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 33 (D. Utah 1962). See generally Coleman, *The Learned Professions*, 33 ABA ANTITRUST L.J. 48 (1967).

However, on several occasions the lower courts have adopted definitions of "trade or commerce" which would include the "learned professions." The Court of Appeals in *United States v. American Medical Ass'n*, 110 F.2d 703, 709-10 (D.C. Cir. 1940), cert. denied, 310 U.S. 644 (1939) (for an explanation of the case's history see note 115 *infra*), did not define the term so as to distinguish between a profession and any other business. The District Court in *Marjorie Webster*, 302 F. Supp. 459, 465 (D.D.C. 1969), took the same approach. But the reasoning of these opinions has not been scrutinized by the Supreme Court. In *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), the Supreme Court approved the application of the Act to the activity there in issue but on grounds which neither approved nor rejected an exemption for the "learned professions." In *Marjorie Webster*, the Court of Appeals reversed but on grounds which did not impugn the District Court's definition of "trade or commerce," 432 F.2d 650 (D.C. Cir. 1970), and the Supreme Court denied certiorari, 400 U.S. 965 (1971).

Among the activities to which the "traditionally non-commercial" limitation applies

The Sherman Act and "Non-commercial" Activities

tical.⁶ In method of application, the first requires that the *activity allegedly restrained* be trade or commerce for the Sherman Act to apply.⁷ For example, in *Martindale-Hubbell* the issue will be whether the allegedly injured attorney's activity, rather than Martindale-Hubbell's, is trade or commerce. The second limitation, excluding from the Act's coverage "traditionally non-commercial" activities,⁸ nonetheless permits the Act to apply when it is shown that the defendant had a "*specific intent or purpose to affect the commercial aspects*"⁹ of the

are those related to "the liberal arts and the learned professions." *Marjorie Webster*, 432 F.2d 650, 654. It is not yet clear how close a relationship is necessary to cause activities related to education or the professions to be outside the purview of the Act. The District Court in *Marjorie Webster*, in denying an exemption to education related activities like accreditation, emphasized the number of diverse activities which are now education related, stating, "Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities." 302 F. Supp. at 465. By failing to distinguish these activities, the Court of Appeals, which sired the "traditionally non-commercial" limitation, implied that they too might fall beyond the reach of the Act, at least where conducted with non-commercial motives. Thus, quite possibly the exemption extends beyond the traditional aspects of education itself to include a host of other activities conducted in the supposedly non-commercial environs of the campus, such as research undertakings, college athletics, and the numerous on-campus services provided by the college or university. *But cf.* *United States v. Wisconsin Alumni Research Foundation*, 1946 Trade Cas. 58,035 (N.D. Ill. 1946), applying the Act to on-campus research endeavors.

6. The court in *Marjorie Webster* implied that the limitations did not apply to exactly the same activities. 432 F.2d at 653.

7. *See American Medical Ass'n v. United States*, 317 U.S. 519, 528-29 (1943).

8. The descriptive accuracy of referring to the *Marjorie Webster* limitation as exempting activities due to their "traditionally non-commercial" character rather than as a result of the absence of commercial purpose may legitimately be questioned. Although the opinion speaks in terms of both the character of the activity and intent, the character of the activity appears to be paramount because only if the character of the activity is such as to remove it from the Act does intent become an issue. The court stated:

Of course, when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality. But the proscriptions of the Sherman Act were "tailored . . . for the business world," not for the non-commercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws. 432 F.2d at 654 (footnotes omitted).

9. *Marjorie Webster*, 432 F.2d 650, 654 (emphasis added.) *Marjorie Webster* did not precisely describe the intent showing required of plaintiffs who attempt to apply the Act to "traditionally non-commercial" activities, but the strict nature of that showing can be inferred from the facts and language in the case. The court based its conclusion that the requisite intent was not present on what it treated as a conclusive finding of fact by the trial court. The District Court did *not* find that the Association's activity was not motivated, at least in part, by a desire to preserve the fiscal well-being of the member institutions. The District Court's finding was merely that there was no "evil, purposeful plotting," 302 F. Supp. at 466.

A further ramification of this strict intent requirement can be seen in a case where the defendant has both commercial and non-commercial motivation. Such a case is exemplified by the facts in *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952), where the motivation behind the medical society's practices under attack was "both monetary and ethical." *Id.* at 328-29. The *Marjorie Webster* court implied that as long as there is a non-commercial purpose, even if accompanied by commercial purpose, the Act would not be applied. The court stated:

It is possible to conceive of restrictions on eligibility for accreditation that could

activity.¹⁰ However, in view of the likely difficulties in proving such "specific intent," this requirement may well lead to the wholesale exemption of "traditionally non-commercial" activities.

The origin of the requirement that an activity be "trade or commerce" is a negative inference drawn from the affirmative language of the Act.¹¹ Since the Act expressly applies to "trade or commerce,"¹² any activity not "trade or commerce," so the inference goes, falls outside the Act. Several cases—beginning in 1922 with *Federal Baseball Club v. National League*¹³—appear to support that inference. In *Federal Baseball*, the Supreme Court refused to apply the Sherman Act to professional baseball because that sport was not "trade or commerce."¹⁴ The Court also referred to the practice of law, saying, "a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State."¹⁵ The Court in reconsidering baseball's antitrust exemption, which now seems to have an idiosyncratic life of its own apart from the "trade or commerce"

have little other than a commercial motive; and as such, antitrust policy would presumably be applicable.

432 F.2d at 654-55.

The "traditionally non-commercial" limitation, in marked contrast to the main stream of antitrust, appears to emphasize the defendants' motivation to the point of excluding consideration of the commercial effects. In *Marjorie Webster*, the allegedly injured party was a junior college that was conducted for profit. The profit-making junior college, in seeking recognition by the defendant accrediting association, had an apparently commercial purpose, a desire to increase profits. The member schools of the defendant association, though not technically profit-making organizations, reaped competitive advantages from the exclusion of *Marjorie Webster* from membership. Behavior in the protected areas, though imbued with commercial effect, is nonetheless exempt if attributable to a non-commercial purpose.

10. In his article on the application of the antitrust laws to certain types of restraints, Coons concluded that non-commercial purpose was relevant. But the difficulties of proving such purpose did not exist in the restraints he chose to discuss, such as Negroes' refusal to patronize segregated transportation facilities or church members' agreement not to attend certain movies. See Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962). "In the hypothetical situations posed, the restraining activity is undertaken by persons not in competition in the market affected—indeed, not in business at all." *Id.* at 708. Coons' analysis is not aimed at the "businessman" defendant at all. Within the category of "businessmen," Coons includes both doctors, *id.* at 727 n.64, and lawyers, *id.* at 753-54. Although *Marjorie Webster* does not refer to this article, it may well have influenced the court's approach. On the possibility of commercial motives successfully masquerading as non-commercial ones see Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 280-81.

11. See Coleman, *supra* note 6, at 48. See also Pogue, *The Rationale of Exemptions from Antitrust*, 19 ABA ANTITRUST SEC. 313, 353 (1961), AMERICAN BAR FOUNDATION, RESEARCH MEMORANDUM SERIES NO. 12, MINIMUM FEE SCHEDULES AND THE ANTITRUST LAWS: A PRELIMINARY ANALYSIS 3 (September 1958).

12. 26 Stat. 209 (1890) §§ 1, 2, and 3.

13. 259 U.S. 200 (1922).

14. See pp. 318-20 *infra*.

15. 259 U.S. at 209.

The Sherman Act and "Non-commercial" Activities

limitation,¹⁶ has read *Federal Baseball* as saying that Congress never intended to bring baseball within the Sherman Act.¹⁷ On the basis of such presumed congressional intent, other decisions imply that "learned professions" fall outside the Act because they too are not "trade or commerce."¹⁸ This year in *Flood v. Kuhn* the Court noted that *Federal Baseball* "has also been cited, not unfavorably, with respect to the practice of law."¹⁹

The second limitation has a more recent origin, although it too rests on the assumption that Congress did not intend the Act to apply universally. The Court of Appeals for the District of Columbia created it in 1970 in *Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools*,²⁰ where a proprietary junior college sued an accrediting association made up of competing schools for unjustifiably refusing to grant accreditation. The first limitation was inapposite because the activity allegedly restrained, the operation of a junior college for profit, was "trade or commerce," even though the defendant accrediting association's activity might not have been characterized as such.²¹ Thus, the court fashioned another limitation, rely-

16. The baseball exemption now relies primarily on (1) stare decisis and (2) congressional intent inferred from congressional inaction. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), *Flood v. Kuhn*, 407 U.S. 258 (1972).

17. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953), *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972).

18. See the opinion of the District Court in *United States v. American Medical Ass'n*, 28 F. Supp. 752 (D.D.C. 1939), *rev'd*, 110 F.2d 703 (1940), *cert. denied*, 310 U.S. 644 (1939), which relied on a reference by the Supreme Court in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932), to a statement made by Justice Story construing The Coasting and Fisheries Act of 1793, c.8, 1 Stat. 305, 316, in *The Nymph*, 18 F. Cas. 506, 507 (No. 10,388) (C.C.D. Me. 1834):

Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.

The District Court concluded that the Supreme Court's reference to the words "not in the liberal arts or in the learned professions," amounted to an "authoritative statement of the Supreme Court that the professions were not 'trade' and therefore not within the intent of the Act." *United States v. American Medical Ass'n*, 110 F.2d 703, 709 (D.C. Cir. 1940). The Court of Appeals disagreed with the District Court, and the Supreme Court eventually decided the case on other grounds. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). However, the Supreme Court apparently accepted the "trade or commerce" limitation as a premise. Although the Court avoided the question of "whether a physician's practice of his profession constitutes trade under Section 3 of the Sherman Act," *id.* at 528, the Court's deferral of that question presupposed the inapplicability of the Act were it to be answered in the negative. Other opinions which treat "trade or commerce" as a prerequisite for application of the Sherman Act are *United States v. Shubert*, 348 U.S. 222, 226 (1954); *United States v. International Boxing Club*, 348 U.S. 236, 251-53 (1955) (dissenting opinion of Justice Minton), and *Kowalski v. Chandler*, 202 F.2d 413, 414 (6th Cir. 1953), *aff'd sub nom. Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). See also *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 490-91 (1950), where the Court, while refusing to decide whether professions were exempt, referred approvingly to Justice Story's definition of "trade." But see note 51 *infra*.

19. *Flood v. Kuhn*, 407 U.S. 258, 271 (1972).

20. 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

21. See 302 F. Supp. 459, 466 (1969).

ing heavily on a Supreme Court opinion stating that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives."²² Concluding that the Act was "'tailored . . . for the business world,' not for the non-commercial aspects of the liberal arts and the learned professions,"²³ the court held the college accrediting association to be exempt from the Act.

II. *Federal Baseball* Reexamined

Federal Baseball, the main pillar of the "trade or commerce" limitation,²⁴ has been misread. Although *Federal Baseball* has been recognized as dealing, at least on one level, with the limited federal power underlying the Act,²⁵ the case is generally read as holding that Congress intended the Act to apply only to "trade or commerce."²⁶ The apparent source of the intent reading is language in *Federal Baseball* saying that baseball,

although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by defendants, personal effort, not related to production, is not a subject of commerce.²⁷

The Court, by using the phrase "trade or commerce," referred only to the jurisdictional test for federal power under the Commerce Clause, which the Act couches in terms of "trade or commerce among the several States."²⁸ Under old Commerce Clause cases, the Court had to

22. 432 F.2d at 654. The Court was quoting *Klor's, Inc., v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1957), where the Supreme Court briefly summarized its opinion in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

23. 432 F.2d at 654, quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961).

24. Paternity is generally attributed to *Federal Baseball*. See, e.g., *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *United States v. American Medical Ass'n*, 110 F.2d 703, 709 (D.C. Cir. 1943). See also Pogue, *supra* note 11, at 353; AMERICAN BAR FOUNDATION, *supra* note 11, at 4.

25. See, e.g., REPORT OF THE SUBCOMMITTEE ON STUDY OF MONOPOLY POWER OF THE HOUSE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 2002, 82d Cong., 2d Sess. 134 (1952); Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236, 241 (1959).

26. See, e.g., *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236, 251 (1954) (opinion of Justice Minton dissenting on other issues); *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970) (opinion of Judge Friendly), *cert. denied*, 400 U.S. 1001 (1971). *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, *cert. denied*, 385 U.S. 990 (1966); REPORT OF THE SUBCOMMITTEE ON STUDY OF MONOPOLY POWER OF THE HOUSE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 2002, 82d Cong., 2d Sess., 134 (1952).

27. 259 U.S. at 209 (1922).

28. See note 41 *infra*. The dissenters, Justices Burton and Reed, in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), perceived that *Federal Baseball* was a case

The Sherman Act and "Non-commercial" Activities

decide for constitutional purposes whether the subject matter being regulated was "commerce" as well as whether it was "among the several States."²⁹ In both the Court of Appeals and the Supreme Court, the case turned on Commerce Clause precedents. Nowhere in their opinions did those courts imply that the phrase "trade or commerce" restricted the Act in any way other than by reference to the federal power involved. The issue was not whether Congress had chosen to exempt baseball from the Act; it was whether Congress lacked the power to include baseball within the Act.³⁰ Thus, *Federal Baseball*

dealing only with the existence of interstate commerce as a requisite for federal power. However, the dissenting opinion did not attack the majority's reading of *Federal Baseball* because they did not seem to understand that the majority was attributing to *Federal Baseball* the enunciation of limits on the scope of the Act apart from the interstate commerce requirement. The dissenting opinion stated,

Whatever may have been the situation when the Federal Baseball Club case was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce. *Id.* at 357 (1953). Thus, the dissent read the majority to be basing its per curiam affirmation upon lack of interstate commerce, as it read *Federal Baseball* to be doing. For another commentator who also read *Federal Baseball* as dealing only with federal power, see Eppel, *Professional Sports*, 33 ABA ANTITRUST L.J. 69, 70 (1967). See also *Gardella v. Chandler*, 172 F.2d 402, 407-09 (2d Cir. 1949), where, without explicitly saying so, Judges Learned Hand and Frank appear to be reading *Federal Baseball* as a case dealing only with the interstate commerce requirement.

29. These dual requisites for applicability of the Commerce Clause are illustrated by *Hooper v. California*, 155 U.S. 648 (1895), the principal case upon which the Court in *Federal Baseball* relied. *Hooper* held that the Commerce Clause did not prevent a state from prescribing the conditions on which a foreign insurance company may do business in that state because "[t]he business of insurance is not commerce," *id.* at 655, but is merely incidental thereto. Propounding the same distinction, the Court in *Federal Baseball* held that the Commerce Clause did not apply to professional baseball despite the interstate travel involved because the activity itself, playing baseball, was not commerce. "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place." 259 U.S. at 209.

The analysis in *Federal Baseball* may strike modern readers as relating to an autonomous statutory requirement because later cases have eroded this stringent Commerce Clause requirement that the subject matter be "commerce." See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 231-34 (1948); Kallis, *supra* note 23. According to the Supreme Court in *Mandeville Farms*, the transition from this old analysis "was neither smooth nor immediately complete, particularly for applying the Sherman Act. The old ideas persisted in specific applications as late as the 1950's." 334 U.S. at 233. The transition having begun in 1911, see *id.*, *Federal Baseball's* reliance on an 1895 Commerce Clause precedent is illustrative of that persistence. In this regard, Kallis refers to *Federal Baseball* as a "throw back," *supra* note 25, at 241.

30. Discussing authorities on the issue before the court, the Court of Appeals said: In the American Baseball Club Case the precise question we are considering was passed upon in a carefully prepared opinion, and it was held that the production of exhibitions of baseball did not constitute trade or commerce. 269 F. 681, 686 (1920) (emphasis supplied). The case to which the Court of Appeals referred, *American League Baseball Club v. Chase*, 86 Misc. Rep. 441 (1914), was concerned only with the reach of the federal commerce power. Justice Bissell of the New York Supreme Court said:

I cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act. *Id.* at 459. After discussing the defendant's business of professional baseball, the Court of Appeals concluded that the defendant is "not engaged in interstate commerce." 269 F. at 686.

held only that in 1922 the Commerce Clause failed to cover baseball. And *Federal Baseball's* example with respect to lawyers going out of state meant only that in 1922 the commerce power did not reach activities which were not "commerce" despite incidental interstate travel. Nothing in *Federal Baseball* warrants the conclusion that the case recognized a separate jurisdictional requirement.³¹

Soon afterwards, in an opinion often overlooked by supporters of the limitations, the Supreme Court itself interpreted *Federal Baseball* as dealing solely with federal power. In *Atlantic Cleaners & Dyers v. United States*,³² decided in 1932, the Court considered a claim that the phrase "trade or commerce" in Section 3 of the Act should be limited by *Federal Baseball's* construction of the same phrase in Sections 1 and 2. But the section of the Act at issue in *Atlantic Cleaners & Dyers*, Section 3, represents an exercise not of the commerce power but of Congress' plenary power to legislate for the District of Columbia.³³ Since the limits of the commerce power in no way restrict the power of Congress under Section 3, the Court rejected the *in pari materia* argument, distinguishing *Federal Baseball's* restrictions as dealing with power limits and not congressional intent behind the Sherman Act.

Despite *Atlantic Cleaners & Dyers*, the Court has treated *Federal Baseball* as based on congressional intent.³⁴ The Court did so this year when it reaffirmed the baseball exemption in *Flood v. Kuhn*.³⁵ Curiously and most significantly, however, the Court on those occasions has never provided any specific evidence of legislative intent—an omission that undercuts the credibility of the legislative intent reading of *Federal Baseball*.

31. It is interesting to note the ramifications of the realization that *Federal Baseball* dealt only with the limits of federal power for the new grounds underlying the baseball exemption: (1) congressional intent as inferred from congressional inaction and (2) stare decisis. First, because *Federal Baseball* held that Congress did not have the power to reach baseball, only congressional inaction after *Toolson* in 1953 can be read as approval of the exemption. It is difficult to read congressional inaction in the years between *Federal Baseball* and *Toolson*, as signifying more than a recognition of the inadequacy of the commerce power to reach baseball. However, because *Toolson* implied that Congress did have the power to reach baseball, inaction after 1953 can be read as approval. In view of the number of proposals that have been presented to Congress since 1953, there is still a strong case for congressional approval. See note 110 *infra*. Second, *Toolson's* reliance on stare decisis is undercut because stare decisis on the principle that baseball is not interstate commerce and therefore not subject to the Act is in direct opposition to *South-Eastern Underwriters Ass'n*, holding that the insurance business was not protected from the application of the Sherman Act despite numerous cases holding that insurance was not within the reach of the commerce power. See p. 323. However, by the time the issue reappeared this year in *Flood*, a strong argument for stare decisis was possible on the basis of *Toolson* which rested the inapplicability of the Act on grounds other than lack of interstate commerce.

32. 286 U.S. 427 (1932).

33. As conferred by Art. 1, § 8, cl. 17 of the Constitution.

34. See, e.g., *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

35. 407 U.S. 258, 284-85 (1972).

The Sherman Act and "Non-commercial" Activities

III. Legislative Intent

Unfortunately, the legislative history of the Sherman Act³⁶ contains no reference to applicability of the Act to those areas likely to be exempt under the "trade or commerce" limitation, such as law, medicine, and other "learned professions." But the debates do show that Congress³⁷ used the language "trade or commerce" for a specific reason unrelated to intending an autonomous restriction on the Act's reach. The phrase was merely a convenient drafting device for incorporating the common law doctrine of "restraint of trade" without exceeding the constitutional power upon which the Act was predicated.³⁸ The relevant language from the Act is:

Section 1 . . . in restraint of trade or commerce among the several States. . . .

Section 2 . . . any part of the trade or commerce among the several States

Section 3 . . . in restraint of trade or commerce³⁹

The draftsmen unquestionably used the term "restraint of trade" to define the conduct made illegal by reference to the common law doc-

36. The Sherman Act has traditionally been interpreted by resort to its legislative history. See, e.g., *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940); *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911). It must be remembered, however, that legislative history should be used with certain reservations. The words of individual Congressmen can never be represented as necessarily conveying the policy behind the Act. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318-19 (1897). See also F. McCaffrey, *STATUTORY CONSTRUCTION* 75-76 (1953); 2 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTIONS*, at 499-502 (3d ed. 1943). On the other hand, "statements of individual legislators as to the evils requiring legislative attention" are generally valuable in proving "that the legislature intended to remedy the evils described." 2 SUTHERLAND, *supra*, at 502. See also McCaffrey, *supra*, at 76; *Standard Oil Co. v. United States*, 212 U.S. at 50. With the Sherman Act, distortion is minimal, because there appears to have been a general consensus as to the evils that inspired the Act. In 1890, the trust problem was not a partisan issue (see O. KNAUTH, *THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY* 17-19 (1914); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 247-48 (1956)), and there does not appear to have been major conflict over the values behind the Act. See H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 227 (1955). In *Apex Hosiery*, the Supreme Court stated:

The unanimity with which foes and supporters of the bill spoke of its aims as the protection of free competition, permit use of the debates in interpreting the purpose of the Act.

310 U.S. at 495 n.15. See also KNAUTH, *supra*, at 18.

37. The form in which the statute was finally enacted in 1890 was not the creation of Senator Sherman but of the Judiciary Committee. Unfortunately, most of the debate on the Act occurred before the Judiciary Committee introduced its version of the bill. Thus, there was little discussion by the legislators after the drafting of the Act as we know it. However, prior debates referring to the language later incorporated into the Act offer strong inference as to the purpose intended by the use of that language.

38. In *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), the Court stated:

The field covered was "restraint of trade" which had a well known meaning at common law and the words "or commerce between the several states" were added to put the restraints prohibited within the constitutional limitations on Congressional power.

Id. at 406. See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 494-95 (1940).

39. 26 Stat. 209 (1890).

trine of that name.⁴⁰ They used the term "commerce among the several States" to invoke the language of the Commerce Clause and thereby avoid possible constitutional objections to the Act.⁴¹

The term "trade or commerce" in Section 1 simply coupled the separate phrases "restraint of trade" and "commerce among the several States" by equating the terms "trade" and "commerce."⁴² Throughout the Act, Congress referred to "restraint of trade or commerce" and "trade or commerce among the several States" rather than "restraint of trade" and "commerce among the several States" in order to maintain the equivalency of meaning necessary to join these phrases in Section 1. Thus, Congress joined the two concepts—"restraint of trade" and "commerce among the several States"—without intending to set up a new independent concept called "trade or commerce." Insensitive to their separability, courts have fused together the last word of one with the first word of the other to form a hybrid unforeseen and unintended by Congress.

Congress' desire to link the Act to the Commerce Clause raises the argument that such a drafting device forever froze the Act to conform

40. The Supreme Court in *Apex Hosiery* stated that, "the phrase 'restraint of trade' which . . . had a well understood meaning at common law, was made the means of defining the activities prohibited." 310 U.S. 469, 494-95 (1949). See THORELLI, *supra* note 36, at 222 n.151. When Senator Hoar presented the Judiciary Committee's proposed version of the bill, which became the Sherman Act, he stated: "We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions . . ." 21 CONG. REC. 3146 (1890). See also, e.g., the remarks of Senator Sherman, *id.* at 2457, 2461; Senator Hoar, *id.* at 3152; and Senator Edmunds, *id.* at 3151-52.

41. See THORELLI, *supra* note 36, at 222 n.151. Senator Edmunds, who is generally regarded as the principal author of the final version of the Act (see Letter from Albert H. Walker to the Editor in CEN. L.J. 257-59 (1911); LETWIN, *supra* note 36, at 254-55), proposed to the Judiciary Committee "that it is competent for Congress to pass laws preventing and punishing contracts, etc. in restraint of commerce between these states." The Committee members unanimously agreed. SENATE, COMMITTEE OF THE JUDICIARY, MINUTE BOOK 226 (March 31, 1890). Senator George, who had originally suggested that the bill be referred to the Judiciary Committee because of possible constitutional infirmities, said before the Senate:

The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress.

21 CONG. REC. 3147 (1890). See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

42. See THORELLI, *supra* note 36, at 222. Discussing the use of this terminology Thorelli concludes:

The substantive matter of Section 1 is a restraint of trade or commerce. It has sometimes been claimed that "trade" or "commerce" mean widely different things. According to dictionaries published around 1890, however, it would seem that these terms for most practical purposes can be regarded as synonymous.

Id. at 222. Construing "trade or commerce" for different reasons, Putnam, J., in *United States v. Patterson*, 55 F. 605 (C.C.D. Mass. 1893), stated:

So in this statute I think the words "trade or commerce" mean substantially the same thing. But the use of the word "trade" nevertheless is significant. In my judgment, it was probably used because it was a part of the common law expression, "in restraint of trade . . ."

Id. at 640. The same conclusion was reached by *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932).

to the Commerce Clause as applied in 1890, far short of its reach today. But this intent argument, if ever invoked on behalf of the "trade or commerce" limitation, would lead to a very different limitation than the one espoused by courts so far. In defining "trade or commerce," courts have generally looked to factors other than the scope of the Commerce Clause in 1890. Moreover, the Supreme Court has answered this argument by allowing the Sherman Act to grow with the Commerce Clause.⁴³ In *United States v. South-Eastern Underwriters Ass'n*,⁴⁴ decided in 1944, the defendants argued that the 51st Congress, which passed the Sherman Act, intended it to apply only to those activities considered interstate commerce under an 1890 construction of the Commerce Clause. At stake in *South-Eastern Underwriters* was anti-trust liability for price-fixing in the insurance business, which since 1869 the Court had repeatedly held not to be interstate commerce.⁴⁵ Nevertheless, the Court in *South-Eastern Underwriters* explicitly held that the 51st Congress intended the Sherman Act's scope to expand as the Commerce Clause received an increasingly broad construction.⁴⁶ The weight of available evidence of congressional intent buttresses the Court's holding.⁴⁷ If the Court had limited the Sherman Act to the 1890 scope of the Commerce Clause—that is, to interstate transportation and "contracts to buy, sell or exchange goods to be transported" across state line⁴⁸—it in effect would have gutted the Act⁴⁹ and overruled numerous Sherman Act precedents.

43. See Searles, *Trade or Commerce Among the Several States or with Foreign Nations*, in AN ANTITRUST HANDBOOK 141 (Sec. of Antitrust Law ABA ed. 1958).

44. 322 U.S. 533 (1944).

45. See *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1869); *Hooper v. California*, 155 U.S. 648 (1895); *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495 (1913).

46. 322 U.S. at 556-59.

47. Evidence from the legislative history can be offered in support of either an intention to freeze the Act at what was interstate commerce in 1890 (see evidence offered by dissent, *id.* at 574-75) or an intention that the Act should expand with broadening notions of interstate commerce (see evidence offered by majority, *id.* at 557-61). However, as Charles Stuart Lyon concludes, "it seems fair to say that the evidence fits the conclusions of Justice Black [majority] better than those of Justices Stone and Frankfurter [minority]" *Old Statutes and New Constitution*, 44 COLUM. L. REV. 599, 607 (1944). The device of tying a statute to a constitutional provision is not unique to the Sherman Act. Indeed, similar issues have arisen in the interpretation of other federal statutes when the constitutional provision to which they were tied expanded. See *id.* at 603-38. Because the issue is one of congressional intent, decisions construing other such statutes are of limited relevance. But in those cases where congressional intent is not clear, precedents from other areas prior to the passage of the statute in question may be important.

48. *United States v. E. C. Knight Co.*, 156 U.S. 1, 13 (1894). In *United States v. Debs*, 64 F. 724 (C.C.N.D. Ill. 1894), the circuit court discussed pre-1890 Commerce Clause cases and found that the commerce power in 1890 embraced "all instrumentalities and subjects of transportation among the states" *Id.* at 751.

49. According to the Supreme Court in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), the restrictive reading of the Commerce Clause around the time when the Act was passed, as represented by *United States v. E. C. Knight*, 156 U.S. 1 (1894),

Since the Sherman Act clearly is not confined by 1890 constructions of the Commerce Clause, the "trade or commerce" limitation must find other evidence of legislative intent to survive. The debates disclose no such evidence. On the contrary, the legislative history shows that Congress meant to strike broadly at certain economic evils to the full extent of its power.⁵⁰ After an identical historical inquiry, the Supreme Court in *Atlantic Dyers & Cleaners* concluded that Congress did not intend "trade or commerce" in Section 3 of the Act to have a restrictive meaning.⁵¹ The Court stated:

A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Anti-Trust Act and of the mischief to be remedied, as well as the general trend of debate in both Houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade and to that end *exercised all the power it possessed*.⁵²

IV. Policy

A. Strong Policy Underlying the Act

Sherman Act policy provides a powerful argument against the two supposed limitations.⁵³ The Act's policy is to bar certain economic evils, regardless of where they occur.

made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products.

334 U.S. at 230.

50. Senator Edmunds, *supra* note 41, explained that the Act was drawn in the form in which we know it because of a desire "to strike at these evils broadly." 21 CONG. REC. 3148 (1890). See 2 A. EDDY, THE LAW OF COMBINATIONS § 800 (1901) who concludes, "To the extent of the power of Congress the Act is comprehensive." See also Searles, *supra* note 43, at 141.

51. *Atlantic Cleaners & Dyers*' reference to Justice Story's definition of the word "trade" as used in The Coasting and Fisheries Act of 1793, 286 U.S. at 435-36, has been misinterpreted by later courts as authoritatively defining the term "trade or commerce" in the Sherman Act, see note 115 *infra*. In *Atlantic Cleaners & Dyers*, as in *United States v. National Ass'n Real Estate Bds.* where Story's definition was again referred to, 339 U.S. at 490-91, the reference was not made for the purpose of excluding certain activities from the reach of that term. Instead, reference was made in both cases in order to show the inclusive breadth of the term "trade or commerce" which both cases found to be inclusive of the activities there in issue. Neither case made any pretense of transplanting Story's 1834 definition from an entirely alien context as an authoritative definition of "trade or commerce" in the Sherman Act. Reliance on these references as approving Story's definition for the purpose of excluding activities from the scope of the Act is entirely unfounded.

52. 286 U.S. at 435 (emphasis supplied).

53. Courts have traditionally looked to the original congressional intent and the underlying policy to determine the Act's proper construction. This approach was originated by Chief Justice White in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). He asserted

The Sherman Act and "Non-commercial" Activities

In announcing the "traditionally non-commercial" limitation, the *Marjorie Webster* court sought support in past Supreme Court decisions for the contrary theory that the type of activity, rather than potential for economic evils, determines whether the Act applies. The court, for example, quoted *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*⁵⁴ saying that the Sherman Act restrictions were "'tailored . . . for the business world,' not for the non-commercial aspects of the liberal arts and the learned professions."⁵⁵ But the court failed to convey the Supreme Court's distinction between "political" as opposed to "business" predation; the former was not actionable under the Act primarily because of the constitutional problems inherent in interpreting the Act so as to interfere with freedom of speech and the right to petition. *Marjorie Webster* similarly relied on language in *Apex Hosiery Co. v. Leader*⁵⁶ saying that the Act was aimed at "trusts" and combinations with commercial objectives and not at organizations like labor unions.⁵⁷ But in view of subsequent congressional pronouncements concerning labor's relation to the antitrust laws, the union analogy has no real force.⁵⁸ *Marjorie Webster* must depend upon the belief that institutions of higher education somehow differ from the late nineteenth century trusts.⁵⁹ But the court in *Marjorie Webster*

that the Act should be construed in the "light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute" *Id.* at 64. In the same vein, Justice Day stated: "the courts should construe the law with a view to effecting the object of its enactment." *United States v. Union Pacific R.R. Co.*, 226 U.S. 61, 87 (1912). See also *United States v. American Linseed Oil Co.*, 262 U.S. 371, 388 (1923).

54. 365 U.S. 127 (1961).

55. 432 F.2d at 654.

56. 310 U.S. 469 (1940).

57. 432 F.2d at 654.

58. See Searles, *supra* note 41, at 145. In the labor-antitrust area, the courts have been confronted with an entirely different problem: the necessity of rationalizing the inconsistent policies of Congress' labor and antitrust laws. "The conflict between competition and collective bargaining creates severe problems of statutory interpretation, as well as critical issues of public policy." Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 28 (1963). Thus, the extent to which the Sherman Act is inapplicable to labor organizations is attributable to subsequent legislation rather than to the original intent of the Congress which passed the Sherman Act.

59. Quoting *Apex Hosiery* to the effect that, "The Act was a product of 'the era of "trusts" and of "combinations" of businesses and of capital,'" the Court concluded that it was aimed primarily at "combinations having commercial objectives." 432 F.2d at 654 (footnote omitted). In so doing, the Court seems to have confused the evils at which the Act was aimed with the context in which they arose in the years prior to 1890. The evil at which the Act was aimed was not those particular "trusts" and "combinations" themselves, but the harms which they perpetrated upon the public. In his comprehensive treatise on the nature and effects of the trusts, *THE TRUST PROBLEM IN THE UNITED STATES* (1921), Eliot Jones concludes that the trusts injured the public by "charging prices higher than the public would pay under competitive conditions." *Id.* at 282. Senator Sherman's speeches in support of his bill bear this out. He stated, "I am not opposed to combinations in and of themselves," 21 CONG. REC. 2569 (1890) and summarized:

It is the unlawful combination, tested by the rules of the common law and human

made no finding that the economic evils at which the Act was aimed are absent from the areas exempted by the limitation. The basis for *Marjorie Webster* is, therefore, that Congress never intended the Sherman Act to reach these economic evils when they occur in sectors of the economy in which they did not exist in 1890.

Courts have traditionally interpreted the Sherman Act "in light of its legislative history and of the particular evils"⁶⁰ at which it was aimed.⁶¹ A narrow view of these evils is given in *Marjorie Webster*. But in *Apex Hosiery*—the very case on which *Marjorie Webster* relied—the Supreme Court interpreted those evils more broadly. According to the Court in *Apex Hosiery*, the Sherman Act was designed to strike at the evil of "control of the market by suppression of competition in the marketing of goods and services . . . which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services."⁶² The Supreme Court has consistently considered the evil in general economic terms.⁶³ The Act maintains a free market by barring interference from accre-

experience, that is aimed at by this bill, and not the lawful and useful combination. *Id.* at 2457. Sherman said his bill sought "only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer." *Id.* Speaking of trusts, he said, "If they conducted their business lawfully, without any attempt by these combinations to raise the price of an article consumed by the people of the United States, I would say let them pursue that business." *Id.* at 2569.

Similar sentiments were expressed by others such as Senator Pugh, a member of the Judiciary Committee, which prepared the Act in its present form. Senator Pugh said: "[T]he existence of trusts and combinations to limit the production of articles of consumption entering into interstate and foreign commerce for the purpose of destroying competition in production and thereby increasing prices to consumers has become a matter of public history, and the magnitude and oppressive and merciless character of the evils resulting directly to consumers and to our interstate and foreign commerce from such organizations are known and admitted everywhere *Id.* at 2558. Thus, Congress was not stirred merely by use of the "trust" form but by the evils produced by the aggregations of economic power operating in that form.

60. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940).

61. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). See also McCaffrey, *supra* note 36, at 63-64, 2 SUTHERLAND, *supra* note 36, at 482-84.

62. 310 U.S. 469, 492-93 (1940). See J. CLARK, *THE PROBLEM OF MONOPOLY* 25-38 (1904), JONES, *supra* note 59, at 260-82 (1921). These economic evils will hereinafter be referred to by the shorthand expression "anticompetitive" evils. This usage is only for the purpose of convenience and is not intended to imply that the policy behind the Act requires the universal imposition of atomistic competition.

63. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 50-52 (1911). Projection of the evils in economic terms is consistent with the portrayal of those evils by the legislators themselves throughout the debates. A "trust," as an aggregation of economic power, is injurious to the public because, in the words of Senator Sherman, "it tends to advance the price to the consumer of any article produced." 21 CONG. REC. 2457 (1890). Further describing the injurious effects, Senator Sherman observed:

The price to the consumer depends upon the supply which can be reduced at pleasure by the combination. It will vary in time and place by the extent of competition, and when that ceases it will depend upon the urgency of the demand for the article. The aim is always for the highest price that will not check the demand, and, for the most of the necessities of life, that is perennial and perpetual.

The Sherman Act and "Non-commercial" Activities

tion and exercise of market power on the theory that an open market system will elicit products and services at the lowest prices.⁶⁴ At the same time, it assures those who produce goods or provide services of an open market in which to freely compete.⁶⁵ The Supreme Court reiterated the importance of this policy just this year:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.⁶⁶

In recognition of this strong policy, the Supreme Court in general has narrowly construed those exemptions that Congress has explicitly granted.⁶⁷

The "trade or commerce" and "traditionally non-commercial" limitations frustrate the Act's policy. While Congress intended the Act to reach anticompetitive behavior no matter where it arises, these limitations insulate certain economic sectors where anticompetitive potential exists.⁶⁸ Although this jurisdictional inquiry need not decide the merits of the underlying antitrust claim, the following examples illustrate possible anticompetitive behavior which these limitations would prevent the Act from reaching.

The so-called "learned professions"⁶⁹ bristle with anticompetitive

Id. at 2460. *See also id.* at 2461, 2569. Similar statements by other legislators are numerous. *See, e.g.,* remarks of: Senator Pugh, *id.* at 2558; Senator Stewart, *id.* at 2643; Senator George *id.* at 3147; Senator Edmunds, *id.* at 3148; Senator Teller, *id.* at 2571; Representative Heard, *id.* at 4101; Representative Culbertson, *id.* at 4089, 4090; Representative Wilson, *id.* at 4096-97; Representative Fithian, *id.* at 4102.

64. *See* THORELLI, *supra* note 36, at 227.

65. *Id.*

66. *United States v. Topco Associations, Inc.*, 405 U.S. 596 (1972).

67. *See* Pogue, *supra* note 11, at 327.

68. Regardless of the extent to which these broad and inexplicit limitations may ultimately be narrowed, in their present state they may severely deter the bringing of antitrust suits in the potentially insulated areas. The gauntlet run by the government between 1939 and 1943 in the course of bringing the Sherman Act to bear upon the American Medical Association's campaign to thwart the growth of the contract practice of medicine is indicative of what a plaintiff must be prepared to endure in order to apply the Sherman Act to activities potentially insulated by the limitations. *See* note 115 *infra*. In light of these costly hurdles and the Supreme Court's failure in *American Medical Ass'n* to authoritatively define "trade or commerce," it is not unusual that the issue of the applicability of the Act to such activities has been raised so rarely since that time.

69. The "learned professions" appear to be exempt from the Act under both the "trade or commerce," *see* note 5 *supra*, and the "traditionally non-commercial" limitation. The latter limitation appears from *Marjorie Webster* to exempt the "learned professions" because the Act was not aimed at "the non-commercial aspects of the liberal arts and the learned professions." 432 F.2d at 654.

potential. As the *Martindale-Hubbell* complaint alleges, the *Law Directory* bases an attorney's rating upon solicited evaluations of his competence by established attorneys in the same locality.⁷⁰ This "rate-yourself-and-your-competitors" system reflects the self-interest of established attorneys by discriminating against "more capable young lawyers" and attorneys "who practice personal injury law on the plaintiff's side," and, as a result, it "stifle[s] competition."⁷¹ Many prestigious clients deal only with the highest rated lawyers, so that the rating system allegedly injures those lawyers receiving bad ratings or, worse still, those who receive no ratings at all.⁷² The *Directory's* rating system arguably has served as a collusive mechanism allowing established lawyers to develop and retain economic power in the market for legal services by suppressing "competition among legal counsel," thereby depriving the plaintiffs and the public of the benefits of such competition.⁷³

The facts as alleged in the *Virginia State Bar* suit illustrate the long-recognized⁷⁴ anticompetitive potential of fixed minimum legal fee schedules. Such schedules are adopted and circulated by the state and local bar associations. According to a past president of a local association, "If a lawyer consistently charges low (below the minimum fee schedule), it's considered unethical, and he could be disbarred."⁷⁵ The complaint alleges that the fixed minimum fee schedules have increased the cost of legal services to artificially high levels, by suppressing competition in the market for legal services.⁷⁶ Other equally challengeable restraints in the practice of law include rules against solici-

70. *Steingold v. Martindale-Hubbell, Inc.*, Civil Action No. 72-1460 (N.D. Cal., filed Aug. 11, 1972), Complaint at 6.

71. *Id.* at 5.

72. *Id.* Thus, the nominal plaintiff in *Martindale-Hubbell* claims that on numerous occasions [he] has been denied law fees and forwarded cases because lawyers in other areas read in defendant's professed objective "lawyer's guide" that he was not rated and thus referred these cases to lawyers of lesser ability who are part of the plan and conspiracy and who were "rated."

Id. at 5.

73. *Id.* at 9.

74. See, e.g., WINTERS, *BAR ASSOCIATION ORGANIZATION AND ACTIVITIES* 111 (1954); Brown, *Some Observations on Legal Fees*, 24 SW. L.J. 565, 566 (1970); Coons, note 10 *supra*, at 753-54; Marcus, *Civil Rights and the Antitrust Laws*, 18 U. CHI. L. REV. 171, 192-93 (1950); Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972); Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 WISC. L. REV. 1237. Cf. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950) (applying the Sherman Act to fixed minimum fees in the real estate brokerage business).

75. Washington Post, Nov. 1, 1972, § A, at 12, col. 5.

76. *Goldfarb v. Virginia State Bar*, Civil Action No. 75-72-A (E.D. Va., filed Feb. 20, 1972), Complaint at 8-9.

The Sherman Act and "Non-commercial" Activities

tion,⁷⁷ undue restriction of bar association membership,⁷⁸ and the mysteriously identical starting salaries offered by law firms in the same locality.⁷⁹

In medicine, a similar potential for anticompetitive conduct exists. Medical associations have prevented competition by opposing various group health and prepaid insurance plans,⁸⁰ restricting membership in medical societies,⁸¹ precluding individual physicians from practicing in certain locales,⁸² and allocating posts at medical institutions.⁸³ Furthermore, these associations have artificially curtailed the number of doctors by imposing limits on the number of students accepted by medical schools,⁸⁴ thus barring potential practitioners from entering the field and drastically reducing consumer choices.

77. See Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, *supra* note 74, at 1255-56; Note, *Advertising, Solicitation and the Professional Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

78. See Marcus, *supra* note 74, at 193-94.

Imagine that the largest law firms of a particular state, feeling the pressure of competition from smaller firms and individual practitioners, meet and agree upon a plan like Petitioners' [in *California Motor Transport Co. v. Trucking Unlimited* 404 U.S. 508 (1972)]. They establish a joint trust fund fed by monthly contributions based upon their respective gross billings to clients. The firms then send a circular to all law schools in the nation announcing that they intend to oppose every applicant for admission to the bar of that state before the bar examiners, the character and fitness committees, and all reviewing courts, and that they intend to do so regardless of the merits of any individual's case.

The plan would certainly deter young men and women from seeking to practice law in that state.

Brief of Amicus Curiae, at 18-19, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

79. Even where there is no evidence that law firms have colluded in fixing the salaries they will offer to new associates, an agreement among them may possibly be inferred from the bare fact of parallel action. According to the Supreme Court in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), an agreement may properly be inferred only if the individual decisions are interdependent, such that the individual decisions can be explained by factors that are valid regardless of the actions of the other members of the alleged group. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1972).

80. In *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), the Act was applied to a similar factual situation because the plaintiff's activity extended beyond the traditional practice of medicine, *see* p. 315, and was held to be "trade or commerce." But the same anticompetitive evils would have existed had the plaintiff only been involved in the traditional practice of medicine. *See also* *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952), where the Act was not applied because the requisite effect on interstate commerce was not present. The anticompetitive nature and effect of the established profession's opposition to group health and prepaid insurance plans is widely recognized. *See, e.g.*, Marcus, *supra* note 74, at 195-98; Note, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, 63 YALE L.J. 937, 977-78, 980-98 (1954).

81. See Marcus, *supra* note 74, at 197; Note, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, *supra* note 80, at 950, 953.

82. See Marcus, *supra* note 74, at 198; *Group Health Cooperative of Puget Sound v. King County Medical Soc'y*, 39 Wash. 2d 586, 626-27, 237 P.2d 737 (1951).

83. *See* *Group Health Cooperative of Puget Sound v. King County Medical Soc'y*, 39 Wash. 2d 586, 623-25, 664, 667, 669, 237 P.2d 737 (1951); Marcus, *supra* note 74, at 197-98.

84. See Note, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, *supra* note 80, at 969-74.

As for higher education and related activities,⁸⁵ the facts of *Marjorie Webster* amply illustrate the problem. The district court in that case found, as a matter of fact that the defendant, Middle States Association refused to accredit Marjorie Webster Junior College on the sole ground that it was an institution run for profit; the court found also that this accrediting criterion was unrelated to the quality of education provided.⁸⁶ The Association injured *Marjorie Webster* by encouraging potential students to attend instead junior colleges whose credits could be transferred to four-year colleges.⁸⁷ As a result, the Association also injured students by arbitrarily reducing the number of accredited junior colleges.

Anticompetitive evils in amateur athletics⁸⁸ have been dramatized during the continuing dispute between the National Collegiate Athletic Association and the Amateur Athletic Union.⁸⁹ For example, the NCAA forbids its member athletes from discussing, negotiating, or signing professional contracts while still in college. In addition, each organization bars its athletes from taking part in the other's competition.⁹⁰ Such anticompetitive restrictions injure sports fan-consumers.⁹¹ They also injure amateur athletes by limiting their opportunities to compete, gain exposure, and bargain for professional opportunities.

In terms of the Sherman Act's policy, these potentially anticompetitive practices injure the consumer whose interest is at stake—the client, patient, student, and sports fan—just as severely as the nineteenth cen-

85. See note 5 *supra*. The potential for the anticompetitive evils in education-related activities like research, housing and food services is not diminished by the fact that these activities are conducted on campus.

86. 302 F. Supp. 459, 467-68 (D.D.C. 1969).

87. *Id.* at 468.

88. Amateur athletics, whether conducted in or out of an educational milieu, appear to be exempt under the "traditionally non-commercial" limitation. Also even under the broadest definition which courts have attributed to "trade or commerce"—the one the District Court in *Marjorie Webster* applied—that term would not include amateur athletics. The *Marjorie Webster* definition was: "all occupations in which men are engaged for a livelihood," 302 F. Supp. 459, 465.

89. See generally *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966); *People v. Santa Clara Valley Bowling Proprietors' Ass'n*, 238 Cal. App. 2d 225 (Dist. Ct. App. 1965); *Hearings Before the Senate Committee on Commerce*, 89th Cong., 1st Sess., ser. 89-40 (1965); Note, *The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. CAL. L. REV. 464 (1968).

90. NCAA by-laws 7(b) and (c) prevent student-athletes of member institutions from competing in AAU sponsored track and field and gymnastic competitions. See NCAA, 1968 Manual 45-46. Similarly, AAU Rule 1(2)(b) reciprocates. See OFFICIAL HANDBOOK OF THE AMATEUR ATHLETIC UNION OF THE UNITED STATES 52 (1966).

91. On the basis of the consumer-oriented policy underlying the Act, amateur athletics are in no way distinguishable from professional athletics to which the Act is applicable. See, e.g., *United States v. International Boxing Club of New York, Inc.*; *Radovich v. National Football League*, 352 U.S. 445 (1957); *Deeson v. Professional Golfers Ass'n*, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

The Sherman Act and "Non-commercial" Activities

ture "trusts" injured the consumer of their products. As Justice Marshall said in *Flood v. Kuhn*,

The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players, lawyers, doctors, or members of any other class of workers.⁹²

B. Institutional Considerations

Given the lack of support for limitations in judicial precedent and congressional intent, additional considerations may be instrumental, realistically speaking, in determining whether to apply the Sherman Act to the legal profession and other activities.

1. Judicial Reluctance

Courts may sometimes be motivated to restrict the Act's reach by a belief that the policy of the Act, however strong, is inappropriate for ordering certain activities,⁹³ and a fear of the inability of courts to implement that policy in certain areas. The answer to the first misgiving lies in a long series of cases in which the Supreme Court deferring to the authority and competence of Congress, has refused to grant antitrust exemptions despite arguments that the antitrust laws are inappropriate for governing particular activities.⁹⁴ Although the vagueness of the Sherman Act has given courts leeway in interpreting it,⁹⁵ they have imposed self-restraint when asked to grant exemptions from

92. 407 U.S. 258, 292 (1972). Justice Marshall dissented out of disagreement with the Court on other issues.

Indeed, the importance of the strong policy behind the Act for all areas of economic activity has long been recognized. In *Associated Press v. United States*, 326 U.S. 1 (1945), for example, the Supreme Court held that policy applicable to the dissemination of news and implied that the policy was equally relevant to the activities of providing "food, steel, aluminum, or anything else people need or want." *Id.* at 7.

93. See, e.g., *United States v. Oregon Medical Soc'y*, 343 U.S. 326, 336 (1951); *Flood v. Kuhn*, 407 U.S. 258, 274 (1972); *American Medical Ass'n v. United States*, 130 F.2d 233, 236 (1942), *aff'd*, 317 U.S. 519 (1943); *Levin v. Doctors Hosp., Inc.*, 233 F. Supp. 953, 954 (D.D.C. 1964), *rev'd on other grounds sub nom. Levin v. Joint Comm'n on Accreditation of Hosps.*, 354 F.2d 515 (D.C. Cir. 1965). See also Note, *The Medical Profession and the Sherman Act*, 8 GEO. WASH. L. REV. 1034, 1044 (1940). Cf. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 611-12 (1934).

94. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 351-52 (1940); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561-62 (1944); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 484, 489 (1950); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371-72 (1963).

95. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). In this regard, Senator Sherman stated:

All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.
21 CONG. REC. 2460. See also Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 35 (1966).

it.⁹⁶ In view of the immense consequences of excluding any activity—consequences to potential competitors and the entire consuming public⁹⁷—the decision to exempt is an appropriate one for the legislature, a representative institution that is accountable to the public. Displaying the second misgiving, the court in *Marjorie Webster* was concerned with its competence to determine issues such as whether the proprietary character of a college is so related to its quality that the accrediting association is justified in refusing to accredit profit-run institutions.⁹⁸ In some fields of law, courts normally defer to the good faith and judgment of the specialized participants themselves;⁹⁹ but the general approach is to subject the facts to judicial scrutiny aided by expert testimony,¹⁰⁰ especially where the cost of judicial reluctance is great, as it is here. Although courts lack the expertise of some regulatory agencies, the character of their inquiry in applying the Sherman Act differs markedly from that of agencies applying regulatory statutes. The Sherman Act is predicated on a laissez-faire theory and serves only to impose outside limits on freedom of action. Indeed, in applying the

96. See, e.g., *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561 (1944); *United States v. Shubert*, 348 U.S. 222, 230 (1954); *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236, 243-44 (1955); *Radovich v. National Football League*, 352 U.S. 445, 452 (1956). Extrapolating from these cases, the likely reaction of courts when asked to exempt professions such as law, an American Bar Foundation Research Memorandum states,

[F]rom the point of view of antitrust doctrine the creation of such an exemption [for professions] would be a gross form of judicial legislation which the recent cases involving organized sports indicates [*sic*] the Court is loath to undertake. AMERICAN BAR FOUNDATION, *supra* note 11, at 10.

97. When an exemption is granted, a valuable largess flows to the established participants of the activity, at the expense of their competitors and the population generally. The established participants' freedom of action is no longer constrained by the proscription of the Sherman Act. They are free to reap the economic rewards from aggregation and exercise of economic power in the market. Recognizing this largess, Senator Ervin stated, regarding a proposed exemption from the antitrust laws for professional basketball to allow the leagues to merge, "the owners of professional basketball leagues are asking for what, I believe, is the biggest financial giveaway in this country since the SST was proposed." 117 CONG. REC. S15452 (daily ed. Sept. 30, 1971).

98. The court's concern was expressed with regard to application of constitutional limitations to the Association's refusal to accredit. Application of the Sherman Act would have raised the same factual issue. The court stated:

[W]e believe that judicial review of appellant's standards should accord substantial deference to appellant's judgment regarding the ends that it serves and the means most appropriate to those ends. 432 F.2d at 657.

99. One such field is corporate dividend law. When confronted with minority shareholder suits courts are reluctant to intervene unless there is clear evidence of bad faith on the part of management in not declaring dividends. In such cases, management's explanation of a plausible business reason for not declaring the dividends is generally sufficient to satisfy the court. See, e.g., *Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919); W. CARY, CASES AND MATERIALS ON CORPORATIONS 1575-88 (4th ed. 1969).

100. This approach has generally been taken in professional malpractice suits, whether involving medicine, law, accounting, or education. See generally T. ROADY, JR. & W. ANDERSON, PROFESSIONAL NEGLIGENCE (1960).

The Sherman Act and "Non-commercial" Activities

Act to such specialized activities, trial courts have handled such critical factual issues with relative ease.¹⁰¹

2. *Protection of the Public Interest by Alternative Means*

Another reason for exempting certain activities from the Act's reach may be the theory that certain specialized participants are sufficiently concerned with the high-quality of their service or product that they may be relied upon to regulate themselves. But such a theory assumes either that high quality of product and minimization of price are always consistent with the economic self-interest of the specialist, or that in case of conflict the specialist will unselfishly choose to serve the public. This assumption is belied by experience;¹⁰² it becomes all the more suspect when the relationship between buyer and seller is no longer a personal one, as is increasingly the case where lawyer and client, doctor and patient, and educator and student are concerned. In *Silver v. New York Stock Exchange*,¹⁰³ the Supreme Court faced the issue of whether the existence of a pervasive self-regulatory scheme over stock exchange activity preempted application of the Sherman Act. The Court held that the Act applied, noting that there was nothing built into the scheme of self-regulation "which performs the anti-trust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends."¹⁰⁴ As a general rule, "relief from antitrust standards and consequences is compensated for by a substituted enforcement device providing some assurance that the exemption will not be abused or that somehow the public interest

101. In *American Medical Ass'n v. United States*, 317 U.S. 519, 532-33 (1943), the Supreme Court upheld that the Association's sanctions against doctors involved in the contract practice of medicine constituted a violation of the Act. In *Deesen v. Professional Golfers Ass'n of America*, 358 F.2d 165, 169-72 (1966), *cert. denied*, 358 U.S. 846 (1966), the court upheld the trial court finding that the PGA's rules governing the eligibility of entrants into PGA sponsored tournaments were not in violation of the Act because they were reasonably related to the objective of insuring "that professional golf tournaments are not bogged down with great numbers of players of inferior ability," 358 F.2d at 170. The trial court in *Marjorie Webster*, 302 F. Supp. 459 (1969), found that the Association's denial of accreditation to Marjorie Webster solely because of the latter's proprietary nature did constitute a violation of the Act, stating, "Defendant's assumption that the profit motive is inconsistent with quality is not supported by the evidence," *id.* at 463. The Court of Appeals reversed but on the grounds that the Act was not applicable, not that it had been misapplied. See 432 F.2d 650 (1970).

102. Recognition of natural human greed has led courts to apply the Sherman Act to trade and professional associations in other activities despite their reputedly beneficial aims. See, e.g., *Fashion Originators Guild v. F.T.C.*, 312 U.S. 457, 467-68 (1941); *Silver v. New York Stock Exchange*, 373 U.S. 341, 349-61 (1963).

103. 373 U.S. 341 (1963).

104. *Id.* at 358. See also Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 292.

will be protected."¹⁰⁵ In the areas likely to be judicially exempted under the "trade or commerce" and the "traditionally non-commercial" limitations, there are no substitute enforcement devices. As the Supreme Court in *Silver* realized, self-regulation is an inadequate proxy to the Sherman Act for protection of the public interest.

3. *Legislative Inaction*

Still another reason for exempting certain activities from the Act might be the belief that congressional inaction is a sign of approval of the limitations applied so far. In *Flood v. Kuhn*, the Supreme Court acknowledged Congress' responsibility for granting exemptions and read congressional inaction as approval of the baseball exemption.¹⁰⁶ Even if the Supreme Court was correct in the matter of the baseball exemption, however, it is impossible to infer approval of the broad and inarticulated "trade or commerce" and "traditionally non-commercial" limitations from legislative inaction. The general rule, reiterated by the Supreme Court in 1970,¹⁰⁷ is that legislative inaction in no way reflects congressional intent.¹⁰⁸ Congressional inaction regarding the baseball exemption fell within a narrow exception to the rule providing that inaction may be read as intent where compelling circumstances surround Congress' failure to act.¹⁰⁹ As the Court in *Flood* recognized, baseball had been the subject of two explicit Supreme Court decisions and remedial legislation had repeatedly been before Congress.¹¹⁰ In

105. Pogue, *supra* note 11, at 328.

106. 407 U.S. 258, 281, 283-84 (1972).

107. See *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 241-42 (1970).

108. See *Helvering v. Hallock*, 309 U.S. 106, 119-21 (1939); *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 241-42 (1970); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 327 n.17 (1971); *National Labor Relations Bd. v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-30 (1971).

109. The general rule, as reiterated by the Supreme Court in *Boys Markets* is qualified by the proviso: "in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance . . ." 398 U.S. at 242. This exception to the general rule has been recognized since the rule's inception. In *Hallock*, the Court recognized that congressional inaction might be interpreted as intent where there are "very persuasive circumstances enveloping congressional silence," 309 U.S. at 119. The exception to the rule is explained by the rule's rationale. As stated by the Court in *Hallock*, "Congress may not have had its attention directed to an undesirable decision . . ." 309 U.S. at 120. But where the circumstances make it clear that Congress has considered the matter, approval is more reasonably inferred from inaction.

110. The circumstances surrounding congressional inaction regarding baseball's exemption fit well into this exception. According to the Court in *Flood*, "Legislative proposals have been numerous and persistent. Since *Toolson* more than fifty bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball." 407 U.S. at 281. As *Flood* justifiably concludes, there has been "full and continuing congressional awareness" of baseball's exemption. Such persuasive circumstances leave no room for the possibility that "Congress may not have had

sharp contrast, the limitations at issue here remain unclarified by the Supreme Court and, perhaps as a result, have never been the subject of congressional proposals.¹¹¹ Thus, the situation here more closely resembles what the *Flood* Court called "mere congressional silence and passivity."¹¹² Since Congress has never exempted activities that are not "trade or commerce" or that are "traditionally non-commercial," courts should apply the Sherman Act and allow Congress to decide whether or not to exempt the activities, thus following the courts' past pattern of dealing with supposed antitrust exemptions.¹¹³

4. *Principled Adjudication*

A final reason for creating and perpetuating the limitations under scrutiny here may be the courts' desire for flexibility in administering the Act with regard to activities that ostensibly differ significantly in economic characteristics. But these limitations preclude principled adjudication, undermining the effort to articulate clear criteria for administering the Act. Clear criteria are especially necessary because of the Act's breadth and vagueness.¹¹⁴ Courts have never authoritatively defined "trade or commerce," or synthesized their holdings in a clear doctrine. Faced with contradictory definitions of the concept, the Supreme Court has never settled the issue.¹¹⁵

its attention directed" to the matter. Thus, the Court in *Flood* appropriately distinguished the circumstances of that case from those compelling application of the general rule, which it characterized as "mere congressional silence and passivity," 407 U.S. at 283.

111. The circumstances surrounding congressional inaction in response to the "trade or commerce" and "traditionally non-commercial" limitations call for applying the general rule that inaction should not be read as intent. There is strong basis for drawing the same conclusion which the Court in *Hallock* drew—that "Congress may not have had its attention directed to" the matter. In *Girouard*, there were three Supreme Court decisions firmly establishing the rule at issue; in addition, there was one instance of legislative action on the matter. However, the Court stated, "The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases." 328 U.S. at 70. Certainly here, where there is neither Supreme Court authority establishing the limitations nor legislative recognition of them, the Court's remark is even more apposite.

112. 407 U.S. at 283 (1972).

113. See note 96 *supra*.

114. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 840 (1965).

115. Courts have based their holdings on theories unconnected with one another or with any lasting principles emanating from the Sherman Act itself. One trial court defined the term "trade or commerce" to mean all occupations except those in "the liberal arts or learned professions." The court derived this definition from language in an 1834 case construing the word "trade" in the Coasting and Fisheries Act of 1793. *United States v. American Medical Ass'n*, 28 F. Supp. 752, 755 (D.D.C. 1939). The Court of Appeals disagreed, offering another definition based on the activities to which the doctrine of "restraint of trade" was applied at common law. *United States v. American Medical Ass'n*, 110 F.2d 703, 710-11 (D.C. Cir. 1940). The court did not use this definition to exclude activities from the Act but merely to show that the activity at issue

The absence of such a definition may be explained by the absence of policy: Courts have not determined the economic differences between the kinds of activities to which the Act should apply or not apply. Without a policy articulating these differences, both the "trade or commerce" and "traditionally non-commercial" limitations are likely to remain subject to case-by-case determination, lacking generally applicable principles.

Conclusion

The supposed "trade or commerce" and "traditionally non-commercial" limitations have no viability. The "trade or commerce" limitation turns upon a mistaken reading of *Federal Baseball*, which led to an unsupported and unsupportable presumption about legislative intent. The "traditionally non-commercial" limitation, on the other hand, is predicated on a misinterpretation of the policy behind the Sherman Act. Indeed, both limitations frustrate the true policy of the Act. In contrast to baseball's exemption, which has achieved a unique status separate from the "trade or commerce" limitation, neither limitation is supported by the grounds recently given by the Court for that exemption: congressional inaction and stare decisis.¹¹⁶

was clearly within the reach of the Act. It should be noted that the court's method of defining the term "trade or commerce," if used to exclude activities from the purview of the Act, would be as fallacious as *Marjorie Webster's* technique of defining the reach of the Act in terms of the activities in which the 19th Century trusts flourished. See pp. 325-26. Both techniques confuse the context in which the evils have arisen in the past with the evils themselves.

The Supreme Court has adopted neither of these definitions, and has provided no clue as to how to distinguish those activities which are not "trade or commerce." The issue was originally presented for scrutiny by the Supreme Court in 1940 when the defendants sought certiorari from the Court of Appeal reversal of the District Court's dismissal of the action. On this occasion the Supreme Court denied certiorari. *American Medical Ass'n v. United States*, 310 U.S. 644 (1939). The case then went back to the District Court for trial which resulted in the conviction of the American Medical Association. Appeal from the District Court's judgment based upon the conviction was taken to the Court of Appeals, *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942). The Court of Appeals affirmed, and the Supreme Court this time granted certiorari in part. However, the Court avoided the necessity of providing an authoritative definition of "trade or commerce," deciding the case on other grounds. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). See p. 315 *supra*. In *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 489 (1950), the Supreme Court held the business of real estate brokerage to be "trade or commerce," and the Court's failure to articulate specific criteria for defining the phrase provoked a fiery dissent from Justice Jackson, who stated "[i]f real estate brokerage is to be distinguished from other professions . . . the Court does not impart standards for so doing." *Id.* at 496.

116. The "trade or commerce" and "traditionally non-commercial" limitations cannot rely on either of the grounds which have supplanted the intent of the 51st Congress as foundations for the baseball exemption. As has been shown, congressional approval of these broad and inarticulated limitations cannot be inferred from congressional inaction. See pp. 334-35. Similarly, exemptions for other activities cannot be justified on grounds of stare decisis. The Supreme Court has not spoken on the issue so as to provide any basis for detrimental reliance.

The Sherman Act and "Non-commercial" Activities

The threshold question of the Act's applicability, of course, differs from the ultimate question of substantive legality under the Act. In both the *Martindale-Hubbell* and *Virginia Bar Ass'n* suits, courts might find reasons for not proscribing the practices under attack. But no reasons exist for denying jurisdiction.¹¹⁷ On finding that these activities bear the necessary relationship to interstate commerce,¹¹⁸ courts should proceed to consider whether the facts show substantive violations. The reasons, if any, for not proscribing those practices may then be subjected to scrutiny by the legislature and by other courts.

117. It should be noted that there are a number of exemptions resulting from congressional action subsequent to passage of the Sherman Act. See generally Pogue, *supra* note 11; *Antitrust Exemptions*, 33 A.B.A. ANTITRUST L.J. 1 (1967). However, these exemptions do not cover the activities generally thought to be exempted under the "trade or commerce" and "traditionally non-commercial" limitations. There is, however, another judicially created exemption which, if broadly construed, might exclude some of the activities at issue in the *Virginia Bar Ass'n* suit. See AMERICAN BAR FOUNDATION, *supra* note 11, at 9. This exemption was originated by *Parker v. Brown*, 317 U.S. 341 (1943), and covers some state-approved transactions. See Pogue, *supra* note 11, at 354; Bacheider, *State-Approved Transactions*, 33 A.B.A. ANTITRUST L.J. 99 (1967). In *Parker*, the Supreme Court read the constitutional grant of power to state government to restrict the power of Congress to "suspend state laws" without unequivocally announcing its intention to do so. In light of the general trend to grant exemptions only where there is an alternative means for protecting the public interest, see p. 333, it is likely that this exemption will ultimately be restricted so as to exempt only those activities where the state regulation is sufficiently comprehensive to guard against abuse of the exempt status. See generally Donnem, *Federal Antitrust Law Versus Anti-competitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950 (1970).

118. It appears likely that almost all professional activities today would be considered to have sufficient impact upon interstate commerce for this power requisite to be met. See Marcus, *supra* note 74, at 192. According to *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 227-35 (1948), the fact that the activity occurs entirely within one state does not necessarily negate the justification for exercising federal power. The proper inquiry is "whether effects forbidden by the antitrust laws reach from processes occurring within to those occurring without the state," and the effect of subsequent caselaw has been to extend the commerce power when applying the Act. *Kallis, supra* note 25, at 243, 248-51. But see *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). It is likely that the practice of law in general would be considered to have sufficient effect on interstate commerce. See *Arnold & Corley, Fee Schedules Should be Abolished*, 57 A.B.A.J. 655, 661 (1971). But see *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 573 (1944), where Justice Stone in dissent seemingly approved the dictum in *Federal Baseball* saying that the practice of law is not interstate commerce and is not made so by ancillary interstate travel. As for fixed minimum fee schedules particularly, see Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 Wis. L. REV. 1237, 1246-47. But see AMERICAN BAR FOUNDATION, *supra* note 11, at 11. The practice of medicine is also likely to be regarded as having sufficient impact on interstate commerce. See *Arnold & Corley, supra*, at 661. But see *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952); Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, *supra* at 1245 n.54 (listing other medical cases finding no interstate commerce).